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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No.

BERNARD SCREEN PRINTING CORPORATION,

Petitioner,

—against—

UNIVERSAL TERMINAL & STEVEDORING CORPORATION,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Statement

This action sought to recover for damages for a case of machinery damaged on November 29, 1966, as it was being discharged from the SS HAVLOM. The negligence of the Respondent, who was performing stevedoring operations, is conceded and has never been an issue.

The sole question below involved the applicability and validity of certain terms in the bill of lading governing the shipment of the goods. These terms are set forth in the Petition and purport to extend the benefits of certain contractual limitations of liability to Respondent.

As noted in the petition both the District Court and the Court of Appeals for the Second Circuit held that the limitation of liability provisions were valid as applied to Respondent and, accordingly, directed that Respondent's liability be limited to $500.00.

The Facts

To the extent that the facts may be relevant and significant, they will be found set forth in the opinion of the District Court (Judge Newman) at page A1 through A5 of Petitioner's appendix.

Pertinent specific language of the bill of lading is to be found in the opinion of Judge Newman at page A2 and in the opinion of the Court of Appeals for the Second Circuit at pages A8-A9.

ARGUMENT

Petitioner seeks a Writ of Certiorari to the United States Court of Appeals for the Second Circuit on the asserted ground that the courts below erred in failing to recognize an expression of Congressional Intent debarring carriers from inserting in bills of lading provisions of the type here involved. It is further urged that the courts below failed to heed a holding of the court (*United States* v. *Atlantic Mutual Insurance Co., et al.* (343 U. S. 236), which holding, it is claimed by Petitioner, should have precluded the result reached below (reported at 328 F. Supp. 288 and affirmed 464 F. 2d 934).

The action of the Circuit Court, in rejecting the very argument now made, is described as "shocking" (Petitioner's Brief, p. 4).

Respondent, on its part, submits that the decision of the United States Court of Appeals for the Second Circuit (and, indeed, the various other courts which have uniformly reached similar results) (1) violates no Congressional "mandate", (2) fully accords with the law as enunciated by this Court, and (3) is in conformity with both industrial practice, the basic equities of the situation and the uniform weight of lower court decisional law.

Though Petitioner's Brief contains citation of some eight decisions, in reality it relies on one—and only one—decision of this court, that in *United States* v. *Atlantic Mutual Insurance Co.* (the Esso BELGIUM), cited supra.

Characterizing the bill of lading provision which extended the benefits of the "package limitation"* to the stevedore as an invasion of cargo owners' rights against third persons, Petitioner urges that "invasions" of this sort are interdicted by the rationale of the "Esso BELGIUM." A close look at the issues determined by that decision is, therefore, warranted.

Shipowner in the Esso BELGIUM was protected against direct liability to its own cargo by both § 3 of the Harter Act (46 U.S.C. § 192) and § 4(2) of the Carriage of

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* The "package limitation" stipulates to a maximum value of $500 per "package . . . or customary freight unit" *General Motors Corp. v. Moore-McCormack Lines, Inc.*, 2 Cir., 1971, 451 F. 2d 24. By accepting this limited value, the cargo owner receives the benefit of a lower freight rate. If he chooses, the cargo owner may declare the full value of the goods, but then he must pay the full value freight rate.

Goods by Sea Act (46 U.S.C. § 1304(2)), when that liability arises out of a negligence in the "navigation or in the management of the ship." Nothing in either Act, however, precluded cargo from suing the other vessel in a mutual fault (or "Both-to-Blame") two ship collision and recovering from the non-carrying ship the whole of its damage. Of course, the non-carrying vessel would, in a judicially-determined mutual fault case, promptly recover from the cargo-carrying vessel, as part of its collision damages, one-half of the monies paid to cargo. Thus, the cargo-carrying vessel, in a "Both-to-Blame" situation, would indirectly be forced to bear one-half of a loss which, had it been solely at fault, it would not have had to pay at all.

In an effort to obtain relief from this situation, carriers then began to insert "Both-to-Blame" clauses in their bills of lading. These clauses required cargo to indemnify the cargo-carrying vessel where the shipowner was forced to pay another vessel one-half of cargo's damages in a mutual-fault collision.

Mr. Justice Black, speaking for a majority of this Court, held the exculpatory clause invalid, citing an unbroken line of authority to the effect that "common carriers cannot stipulate for immunity from their own or their agents' negligence" (343 U. S. at p. 236). The decision carefully notes that a broad construction of the statute would appear to permit a carrier to do just that. Bearing in mind the policy considerations previously expressed often and uniformly by this court, public policy demanded the holding arrived at there.

Respondent fully subscribes to the principle that a contract of adhesion which exempts carriers "or their agents" from negligence is presumptively against public policy.

In the Esso Belgium, cargo had no options. It could not recover the whole of its collision damages no mat-

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ter what it did. It could exercise no choice to pay a higher freight rate and obtain relief from the onerous effect of the exculpatory clause.

The case at bar, however, presents a far different picture. Here, Petitioner, *had it chosen to spend the money*, could have declared a valuation of goods in excess of $500.00—indeed up to whatever valuation Petitioner might assert the goods truly had.*

As long ago as 1913, cargo interests attempted to persuade this court that an optional valuation clause (i.e. a stipulated limitation on the amount recovered unless a higher freight rate were paid) constituted an invalid release from liability for negligence.

This view was unequivocally rejected by this court in *Kansas City Southern Ry. Co.* v. *Carl*, 227 U.S. 639, 650:

> "Is the contract here involved one for exemption from liability for negligence and therefore forbidden? . . . A declared value by the shipper for the purpose of determining the applicable rate, when the rates are based upon valuation, is not an exemp-

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* The process was described by the Court in *General Motors Corporation* v. *Moore-McCormack Lines, Inc.*, 2 Cir., 1971, 451 F. 2d 24, 26:

> "The decision to limit the carrier's liability to $500 is also in accord with one guiding policy behind the Carriage of Goods by Sea Act—to limit liability of common carriers for damage to cargo where the value of the cargo is not known to the carrier. If a shipper wishes to avoid this $500 limit, he may declare a higher value, thus alerting the carrier of its potential liability and allowing it to charge extra freight, if appropriate. This option was open to GM; by declaring the value of the generators, it would have made Moore-McCormack an insurer up to that value. Having failed to do so, it cannot now complain of the limitation on recovery."

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> tion from any part of its statutory or common-law liability. The right of the carrier to base rates upon value has been always regarded as just and reasonable. The principle that the compensation should bear a reasonable relation to the risk and responsibility assumed is the settled rule of the common law."*

The depiction of cargo owners as a class (Cf. Petition, p. 5) victimized by overbearing shipowners does not withstand the equal light of economic reality. The usual reason a shipper fails to declare a correct valuation—and thus pay an appropriately higher freight rate—is that he does not choose to do so, having insured the goods elsewhere. As Chief Judge Friendly observed in *Nichimen Company* v. *M/V Farland*, 2 Cir., 1972, 462 F.2d 319, 335:

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* This Court pointed out that the principle involved was one of estoppel—since the shipowner had availed itself of a lower freight rate by accepting a limited valuation on the goods, it should not later be heard to complain that the goods were, in fact, worth more. See also, *Hart* v. *Pennsylvania Railroad*, 112 U. S. 331, 340-343.

In *Ansaldo San Giorgio I* v. *Rheinstrom Brothers Co.*, 294 U. S. 494, this Court explained:

> ". . . Such a stipulation, we have said, is not enforcible unless the shipper, for agreeing to such a limitation of the carrier's liability, receives a consideration consisting in the offer of a lower rate as against a higher rate offered for the service without such limitation; or, as has been said, the rate is tied to the release. Agreements of this kind are held to be reasonable and not offensive to the public policy against contracts relieving the carrier from its own negligence. *The agreement as to value, in consideration of carriage at the lower rate thus obtained, is held to estop the shipper from demanding damages in excess of the agreed value.*" [Emphasis supplied.] 294 U. S. 496, 497

> "If Nichimen wanted coverage over $500 per coil, it could either use the statutory alternative of declaring a higher value or cover itself by insurance. Most cargo damage cases are really battles between insurers, See *Leather's Best, Inc.* v. *SS Mormaclynx*, supra, 451 F.2d at 815, and there is no need for shedding crocodile tears on behalf of the shipper or consignee."

Petitioner is conveniently myopic as to the significance of the fact that this Court rendered its decision in *Robert C. Herd & Co.* v. *Krawill Machinery Corp.*, 359 U.S. 297 in 1959, some seven years *after* the decision in the *Esso Belgium* case (1952). It must be a source of surprise to this Court that Petitioner contends that the Supreme Court had foreclosed itself in 1952 from what it clearly said was licit in 1959.

In actuality, cargo owners have continuously sought to persuade the courts that optional valuation clauses contravened public policy. Contrary to what Petitioner now says, the attempt was expressly made in *Carle & Montanari Inc.* v. *American Export Isbrandtsen Lines, Inc.*, D.C. S.D.N.Y., 1967, 275 F.Supp. 76 aff'd 368 F.2d 839, cert. den'd 390 U.S. 1013. The District Court pointed out (275 F.Supp. at p. 79), that a clause limiting the valuation of a package was not a release from liability provision against public policy. The position taken by the District Court was affirmed by the Second Circuit (386 F.2d 839) and certiorari was later denied by this Court (390 U.S. 1013). Since this Court has clearly indicated in *Robert C. Herd & Co.* v. *Krawill Machinery Corp.*, 1959, 359 U.S. 297, that the parties to a bill of lading might, if they so choose, extend the benefits of the package limitation to the

stevedore,* other courts have failed to experience the difficulties now urged by Petitioner.

Thus, in *Secrest* v. *SS Tiber,* 5 Cir., 1971, 450 F.2d 285, the Fifth Circuit reached the same result as did the Second Circuit in construing the extension to stevedore of the same optional valuation clause. In *Sommer Corporation* v. *United Fruit Company* v. *Panama Canal Company,* D.C. Canal Zone, 1972, 335 F.Supp. 412, the District Court, in holding that a limited liability clause (the package limitation) might validly be extended to a stevedore, pointed out (at p. 415) that he extension of the package limitation to stevedore was a universal practice of long standing.

In performing its services a stevedore is doing that which the shipowner is obligated to do under the bill of lading. Stevedore is intimately bound up with the whole process of maritime commerce. The Courts have consistently indicated that if a cargo owner wishes to obtain the right to pursue a lawsuit for full value against either the shipowner or the stevedore (where the stevedore has been described in the bill of lading as a beneficiary), the cargo owner must declare the proper value and pay an adjusted

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* "With regard to petitioner's first contention, we look first . . . and next to the limiting provisions of the bill of lading, to determine whether . . . the shipper and the carrier by the bill of lading, evidenced any intention to limit the liability of negligent agents of a carrier." 359 U. S. at p. 301

"There is, true, nothing in those provisions to indicate that the contracting parties intended to limit the liability of stevedores or other agents of the carrier for damages caused by their negligence. If such had been a purpose of the contracting parties it must be presumed that they would in some way have expressed it in the contract." 359 U. S. at p. 302

freight rate.* Having failed to do so, cargo owner should have no ground for complaint.

Nothing in either decisional or statutory law is to the contrary.

The Petition should be denied.

CONCLUSION

The Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit should be denied.

Respectfully submitted,

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* In *Cabot* v. *S.S. Mormacsean*, 2 Cir., 1971, 441 F. 2d 476, the Court, though finding against a stevedore, nonetheless clearly held that the parties might validly extend the package limitation to stevedores. See also, *Dorsid Trading Company* v. *S.S. Fletero*, D. C. S. D. Tex., 1972, 342 F. Supp. 1, 6; *Toyomenka, Inc.* v. *Toko Kaiun Kabushika Kaiska*, D. C. S. D. Tex., 1972, 342 F. Supp. 292.